IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 24.03.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.A.No.1016 of 2000

V.K.Santhosh Kumar .. Appellant/Complainant

Vs.

P.B.James Baby .. Respondent/Accused

Prayer: This appeal has been preferred against Judgment dated 03.10.2000, in C.C.No.15 of 2000, on the file of the Judicial Magistrate, Valparai.

For Appellant : Mr.SU.Srinivasan
For Respondent : No appearance

JUDGMENT

This appeal has been preferred against the judgment in C.C.No.15 of 2000 on the file of the Judicial Magistrate, Valparai. The case had arisen out of a private complaint filed by the complainant under Section 200 of Cr.P.C., for an offence under Section 138 of the Negotiable Instruments Act against the accused. After recording the sworn statement of the complainant, the complaint was taken on file by the learned Judicial Magistrate.

2. The averments in the complaint in brief are as follows:-

The complainant knows the accused for more than 20 years and that the accused is having business at Salakudi, Thiruchur, in Kerala State. On 20.12.1999 the accused had borrowed a sum of Rs.90,000/- and issued a cheque dated 26.12.1999 drawn in favour of the complainant for a sum of Rs.90,000/- on Union Bank of India. When the cheque was presented on 03.02.2000 in Union Bank of India, the same was returned with an endorsement that there is no sufficient fund in the account of the drawer. Hence, the complaint.

3. After taking the complaint on file the learned Judicial Magistrate issued summons to the accused and on appearance of the

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accused, the learned Magistrate has furnished copies to the accused under Section 207 of the Cr.P.C., and when questioned, the accused pleaded not guilty. On the side of the complainant P.W.1 and P.W.2 were examined and Ex.P.1 to Ex.P.4 were marked.

4. P.W.1 in his evidence would state that he is residing at Valparai and he knows the accused while he was residing at Valparai and that at present the accused is residing in Salakudi, Kerala State, and he was a contractor in 'Tantea' and the he knows very will of the accused and on 20.12.1999 the accused had borrowed Rs.90,000/- as hand loan and to discharge the said loan, he(accused) had drawn a cheque in Union Bank of India on 26.12.1999 for a sum of Rs.90,000/- and when he presented the cheque on 3.2.2000, the same was bounced on the ground that there is no sufficient funds in the account of the drawer. Ex.P.1 is the cheque issued by the accused dated 26.12.1999. Ex.P.2 is the memo issued by the bank dated 3.4.2000 stating the reason for the return of the cheque. Ex.P.3 is the copy of the notice sent by the complainant to the accused. Ex.P.4 is the return postal cover containing the original of Ex.P.3.

5. P.W.2 is an accountant in Union Bank of India. He would depose that the cheque bearing No.10509 was issued to the drawer by Union Bank of India and that the said cheque came to their bank for encashment on 3.2.2000 and the same was returned on the ground that there is no sufficient funds in the account of the drawer. Ex.P.2 is the memo sent by Union Bank of India along with Ex.P.1 at the time of return of the same.

6. When incriminating circumstances were put to the accused he would totally deny his complicity with the crime. The accused has himself examined as D.W.1.

7. After going through the oral and documentary evidence, the learned trial judge on the ground that there was no proper notice served on the accused as required under law, has dismissed the complaint. Hence, this appeal by the complainant.

8. Now the point for determination in this appeal is whether the judgment in C.C.No.15 of 2000 on the file of the Judicial Magistrate, Valpari on the sole ground of improper service of notice, is liable to be set aside for the reasons stated in the memorandum of appeal?

9. The Point:-

9(a) The learned trial Judge relying on the decision reported in 1993 Criminal Law Journal 2196, held that the endorsement on the return postal cover containing the original notice as unclaimed will not be construed as valid service of

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notice and on that sole ground has held that the complainant is not entitled to the relief asked for in the complaint under Section 138 of the Negotiable Instruments Act and accordingly dismissed the complaint.

9(b) The learned counsel for the appellant relying on 1999 (7) SCC 510 (K.Bhaskaran Vs. Sankaran Vaidhyan Balan and Another), and contended that when the notice sent by registered post was returned as unclaimed the court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure. It has been held in the above said dictum of the Honourable Apex Court as follows:-

> "Here the notice is returned as unclaimed and not as refused. Will there by any significant difference between the two so far as the presumption of service is concerned? In this connection a reference to Section 27 of the General Clauses Act will be useful. The section reads thus:
>
> > 27.Meaning of service by post:- Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post'
>
> No doubt Section 138 of the Act does not require that the notice should be given only by "post". Nonetheless the principle incorporated in Section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that is was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice."

So under the principle enunciated in the above said dictum of the Honourable Apex Court, it is clear that on mere endorsement on the postal cover 'unclaimed' it cannot be presumed that there was no valid service of notice. Under Section 27 of the General Clauses Act it is to be presumed that like every ordinary post there was a valid service of notice on the addressee. In this case, from a perusal of Ex.P.4-return postal cover, it is seen that intimation

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was given to the addressee on 12.2.2000 itself. But the addressee/accused has not claimed the said registered post within one week from the date of intimation. Only under such circumstances, the said registered post was returned to sender with an endorsement 'unclaimed' and returned to the sender on 20.2.2000. So it is clear that the findings of the learned trial judge that only on the ground of return of notice as 'unclaimed' without going into the merit of the case, warrants interference from this Court. Point is answered accordingly.

10. In the result, the appeal is allowed and the judgment in C.C.No.15 of 2000 on the file of the Judicial Magistrate, Valparai, is set aside and the matter is remanded to the trial Court for giving a findings on merits on the basis of the oral and documentary evidence available before the trial Court. The learned trail Judge is directed to dispose of the case after following the formalities contemplated under law within a period of one month from the date of receipt of copy of this judgment.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

ssv

To,

1.The Judicial Magistrate, Valparai.

2.The Section Officer,
Crl. Section, High Court, Madras.

1 cc to Mr.SU.Srinivasan, Advocate, Sr. 18921

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